

***United States Court of Appeals  
for the Second Circuit***



**INTERVENOR'S  
BRIEF**





# NO. 76-4278

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IN THE  
United States Court of Appeals  
FOR THE SECOND CIRCUIT

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REA EXPRESS, INC., BANKRUPT,  
C. ORVIS SOWERWINE,  
TRUSTEE IN BANKRUPTCY,  
Petitioners, *et al.*

v.

UNITED STATES OF AMERICA and  
INTERSTATE COMMERCE COMMISSION,  
Respondents, *et al.*

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On Petition for Review of Orders  
of Interstate Commerce Commission

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BRIEF OF INTERVENING RESPONDENTS IN SUPPORT  
OF THE INTERSTATE COMMERCE COMMISSION

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Richard H. Streeter, Esq.  
Edward K. Wheeler, Esq.  
WHEELER & WHEELER  
704 Southern Building  
Washington, DC 20005  
(202) 347-7117

John W. Bryant, Esq.  
EAMES, PETRILLO AND WILCOX  
900 Guardian Building  
Detroit, MI 48226  
(313) 936-3750

Phillip Robinson, Esq.  
ROBINSON, FELTS, STARNES  
& NATIONS  
P.O. Box 2207  
Austin, TX 78701  
(512) 476-6391

Todd A. Peterman, Esq.  
Nelson J. Cooney, Esq.  
AMERICAN TRUCKING ASSNS.,  
INC.  
1616 P Street, NW  
Washington, DC 20036  
(202) 797-5347

Daniel C. Sullivan, Esq.  
SINGER & SULLIVAN  
327 South La Salle Street  
Chicago, IL 60605  
(312) 939-3950

Attorneys for Intervening Respondents

Dated: April 17, 1977

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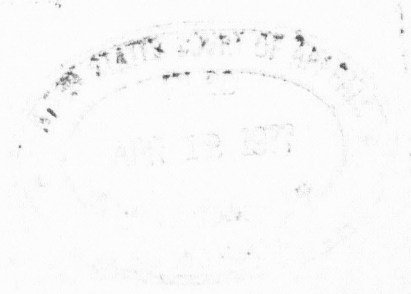


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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

REA EXPRESS, INC., BANKRUPT,	:	
C. ORVIS SOWERWINE, TRUSTEE	:	
IN BANKRUPTCY,	:	
	:	
Petitioners, et al.,	:	
	:	
v.	:	Docket No. 76-4278
	:	
UNITED STATES OF AMERICA and	:	
INTERSTATE COMMERCE COMMISSION,	:	
	:	
Respondents, et al.	:	

ON PETITION FOR REVIEW OF ORDERS  
OF INTERSTATE COMMERCE COMMISSION

BRIEF OF INTERVENING RESPONDENTS IN SUPPORT  
OF THE INTERSTATE COMMERCE COMMISSION\*

ISSUES PRESENTED

In Respondents' view there is one controlling issue:

I. Whether the Interstate Commerce Commission acted within its discretion in dismissing an eight-year-old application seeking a certificate of public convenience and necessity for failure to prosecute as required by the Commission's Rules of Practice.

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\* The Intervening Respondents in support of the Commission are individual motor carriers that participated in the Commission proceeding as "Complainants" and the American Trucking Associations, Inc. In this Brief all such parties shall be designated as "Complainants" or "Respondents." A list of the various carriers is attached as Appendix A.



Should this Court find that the Commission's action in dismissing the application was proper, it need not reach any of the following subsidiary issues:

A. Whether the Interstate Commerce Commission's finding of willfulness has a rational basis and is supported by substantial evidence of record.

B. Whether the Interstate Commerce Commission's conclusion that temporary authority is not protected by the second sentence of Section 558 of the Administrative Procedure Act is proper.

C. Whether the Commission's finding that Petitioners had been afforded due process is rational and supported by substantial evidence of record.

D. Whether the Commission's decision is consistent with the National Transportation Policy.

#### STATEMENT OF THE CASE

This is an action to set aside Orders of the Interstate Commerce Commission served November 19, 1976, and January 28, 1977, in Docket No. MC-C-8862, Brada Miller Freight System, Inc. and REA Express, Inc.<sup>1/</sup> By its Orders the Commission found that

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1/ This proceeding embraced Docket Nos. MC-C-8864, Schneider Transport, Inc. v. REA Express, Inc.; MC-C-8867, American Trucking Associations, Inc. v. REA Express, Inc.; MC-C-8874, Associated Truck Lines, Inc. et al. v. REA Express, Inc.; MC-66562 (Sub-No. 2345) (Part No. 181), REA Express, Inc. - Petition of American Trucking Associations, Inc. for Dismissal of Application; and MC-66562 (Sub-No. 2308 TA), REA Express, Inc. - Petition of American Trucking Associations, Inc. for Cancellation of Temporary Authority. The Complaints in each instance are listed as Document No. 1 in the Certified Index of Documents prepared by the Commission. (footnote cont'd. on p. 3)



REA Express, Inc. (hereinafter "REA") had violated the Commission's Rules of Practice by failing to prosecute an application seeking a certificate of public convenience that REA had filed in June 1968, and dismissed the application. In addition, the Commission revoked a related temporary authority that had previously been extended pending final determination of the corresponding permanent application. Finally, the Commission found that the operations of REA's Rexco division, the only existing REA operation following REA's voluntary cessation of express service in November 1975, were totally illegal and in the nature of willful violations, and ordered their immediate cessation.

#### PROCEEDINGS BEFORE THE COMMISSION

By Complaints filed in November and December 1975, 18 motor carriers, faced with an ever-increasing number of truckload shipments being diverted by the so-called Rexco division of REA Express, Inc. (hereinafter "Rexco" and "REA"), which was allegedly operating pursuant to the authorities held by REA, challenged the legality of those shipments.<sup>2/</sup> These individual carriers were

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1/ (cont'd.) The ATA petition seeking dismissal of the permanent authority application is listed as Document No. 220 in MC-66562 (Sub-No. 2345) (Part 181), and as Document No. 94 in the list of documents prepared for MC-66562 (Sub-No. 2308 TA). Except as hereinafter noted, all references to the Certified Index ("C.I.") will be to the Certified Index in the lead docket, MC-C-8862.

2/ The Complaints, Notice and Answers are as follows:  
 MC-C-8862, C.I. Nos. 1, 2 and 3, J.A., p. 1.  
 MC-C-8864, C.I. Nos. 1, 2 and 3, J.A., p. 843.  
 MC-C-8867, C.I. Nos. 1, 2 and 3, J.A., p. 854.  
 MC-C-8874, C.I. Nos. 1, 2 and 3, J.A., p. 865.

joined by the American Trucking Associations, Inc., which, in addition to filing a Complaint, on December 1, 1976, filed a "Petition Seeking Dismissal of the MC-66562 (Sub-No. 2314) Permanent Authority Application and for Cancellation of the MC-66562 (Sub-No. 2308 TA) Temporary Authority,"<sup>3/</sup> alleging, inter alia, that REA made no attempt in the previous seven years to prosecute the pending permanent application while continuing to operate under temporary authorities, and that REA had specifically repudiated the instant temporary authority as unworkable for the REA-type operation in a subsequent application. After service of the Complaints by the Commission, REA filed its answers.

Following the filing of a motion seeking consolidation and discovery,<sup>4/</sup> under the Commission's General Rules of Practice,<sup>5/</sup> the Commission entered its Order consolidating the Complaint proceedings with the petition filed by American Trucking Associations, Inc. (hereinafter "ATA"), and granted, with certain exceptions, Complainants' request for discovery.<sup>6/</sup> Thereafter, the Complainants commenced discovery at the offices of REA and Rexco. This discovery was subsequently enlarged by the filing of further interrogatories requesting REA to identify its authority under which it traversed certain specified routes and served specific points.<sup>7/</sup>

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<sup>3/</sup> MC-66562 (Sub-No. 2345) (Part No. 181), C.I. No. 220, J.A., p. 963. MC-66562 (Sub-No. 2308 TA), C.I. No. 94, J.A., p. 963.

<sup>4/</sup> C.I. No. 5, J.A., p. 12.

<sup>5/</sup> 49 C.F.R. §1100.56 et seq.

<sup>6/</sup> C.I. No. 9, J.A., p. 47.

<sup>7/</sup> C.I. No. 10, J.A., p. 50.



Subsequently, Complainants on June 7, 1976, filed a request for oral hearing in which they once again pointed to the matters underlying their Complaints.<sup>8/</sup> In addition, they outlined their preliminary estimate of the witnesses to be called and the facts to be established.<sup>9/</sup>

On the following day Complainants filed a further motion asking the Commission to determine the issues in the pending Complaint proceedings prior to considering any application seeking to transfer the REA authorities.<sup>10/</sup> In this pleading Complainants observed, based on their lengthy discovery, that the Rexco operations appeared to be violative of the Interstate Commerce Act, the Commission's rules and regulations and the Department of Transportation's safety regulations.<sup>11/</sup> Complainants further called the Commission's attention to the fact that REA's embargo of express traffic and the liquidation of its transportation equipment and properties had rendered it incapable of providing the express transportation for which the Commission had previously found an immediate and urgent need to exist.<sup>12/</sup> Finally, Complainants noted that the express authorities had been used as a subterfuge to invade illegally a field of service far removed from that authorized by the Commission and that "good cause therefore exists

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<sup>8/</sup> C.I. No. 14, at p. 2, J.A., p. 55.

<sup>9/</sup> Id., pp. 3-4, J.A., pp. 58-59.

<sup>10/</sup> C.I. No. 15, J.A., p. 60.

<sup>11/</sup> Id., p. 2, J.A., p. 62.

<sup>12/</sup> Id., pp. 4-5, J.A., pp. 64-65.

for the immediate revocation of all outstanding temporary authorities issued to REA."<sup>13/</sup> REA promptly filed a response to these pleadings.<sup>14/</sup>

By Order served July 29, 1976, the Commission, Commissioner Murphy, assigned the proceedings for oral hearing commencing August 30, 1976, and directed Complainants to present their direct evidence and argument (insofar as possible) in the form of prepared statements and exhibits to the Commission and all parties by August 23, 1976. The Defendant was advised to be prepared to present its evidence immediately after the completion of Complainants' direct presentation. REA was also directed to provide complete answers to the interrogatories originally filed May 19, 1976.<sup>15/</sup>

Four days before Complainants were to file their "Argument and Evidence," REA filed a petition seeking reconsideration of the Commission's Order setting the proceeding for oral hearing,<sup>16/</sup> to which Complainants replied.<sup>17/</sup> This petition was denied by the entire Commission.<sup>18/</sup>

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<sup>13/</sup> Id., p. 6, J.A., p. 66.

<sup>14/</sup> C.I. No. 19, J.A., p. 68.

<sup>15/</sup> C.I. No. 35, J.A., p. 99.

<sup>16/</sup> C.I. No. 47, J.A., p. 122.

<sup>17/</sup> C.I. No. 48, J.A., p. 142.

<sup>18/</sup> C.I. No. 58. Commissioners Murphy, Hardin and O'Neal did not participate. J.A., p. 316.



On August 23, 1976, the Complainants filed their "Argument and Evidence" as ordered.<sup>19/</sup> Following receipt of the Complainants' "Argument and Evidence," REA filed a further petition for reconsideration<sup>20/</sup> which Complainants also answered.<sup>21/</sup> By Order served August 27, the Commission rejected this petition as being contrary to the Commission's rules.<sup>22/</sup>

#### THE ORAL HEARING

The oral hearing before the Administrative Law Judge commenced as scheduled on August 30, 1976, and lasted until September 22, 1976. At the hearing Complainants supplemented their original evidence with additional direct testimony and with further documentary evidence. As the transcript reveals, Complainants' witnesses' testimony was subjected to lengthy and wide-ranging cross-examination.

In order to establish Rexco's method of operation, Complainants introduced the testimony of seven former Rexco sales agents who had been responsible for the solicitation of shipments and the securing of drivers and equipment for Rexco.<sup>23/</sup> Their

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<sup>19/</sup> C.I. No. 56, J.A., pp. 169-309.

<sup>20/</sup> C.I. No. 57, J.A., p. 310.

<sup>21/</sup> C.I. No. 59, J.A., p. 317.

<sup>22/</sup> C.I. No. 78. Commissioners Murphy, Hardin and O'Neal did not participate. J.A., p. 321.

<sup>23/</sup> The Rexco sales agents are listed in order of appearance by name, direct prepared testimony and oral testimony: (cont'd. on p. 8)



testimony, which is uncontroverted, unequivocally establishes that the Rexco operations were conducted with willful disregard for the limitations in REA's authority and for the governing rules and regulations of the Commission and the Department of Transportation. In particular, the testimony demonstrates that Rexco management made no attempt to comply with the criteria of an express service. For example, their testimony proves that Rexco utterly failed to restrict its operations to points which REA was authorized to serve; that it failed to comply with the regular-route restrictions contained in each of REA's authorities; that it failed to offer a bona fide holding-out to provide express service; that it failed to limit its holding-out to commodities which may be safely transported in ordinary van equipment; that it failed to perform service according to firmly established schedules; and that it failed to comply with its governing tariffs.<sup>24/</sup>

Complainants also presented former REA officers, including the former "Vice President, General Manager and Chief Operating Officer for REA's Pacific Region" and REA's "Regional Vice President,

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23/ (cont'd. from p. 7)

William Miller, Ex. 1, App. 3, Tr., pp. 40-133, J.A., p. 257.

J. B. Hunt, Ex. 1, App. 6, Tr., pp. 156-230, J.A., p. 285.

Mary Ann Campbell, Ex. 1, App. 29, Tr., pp. 234-277, J.A., p. 305.

Roy H. Stewart, Ex. 1, App. 8, Tr., pp. 277-336, J.A., p. 296.

John Sands, Ex. 1, App. 7, Tr., pp. 347-387, J.A., p. 293.

Stanley Brown, Ex. 1, App. 4, Tr., pp. 390-528, J.A., p. 269.

William Coates, Ex. 1, App. 5, Tr., pp. 528-558, J.A., p. 280.

24/ Since the Petitioners do not challenge the factual accuracy of the Commission's findings with respect to these violations, no attempt will be made to discuss this testimony in detail. Instead, the Court's attention is invited to the "Argument and Evidence of Complainants," C.I. No. 56, pp. 26-54, J.A., pp. 169-249 and the "Post-hearing Brief of Complainants," C.I. No. 116, pp. 13-62, J.A., pp. 623- where the evidence is discussed in great detail.



Regional Manager, Atlanta."<sup>25/</sup> These witnesses provided the Commission with an historical analysis of the traditional REA operations, both from a marketing and an operational standpoint.

Complainants also presented testimony from various motor carrier witnesses in order to demonstrate the adverse effect that the Rexco operations had on the operations of these duly authorized carriers.<sup>26/</sup> Complainants through these witnesses developed certain comparisons of rates published by Rexco and those published by other carriers, demonstrating that the Rexco rates were far below those of competing carriers.<sup>27/</sup> The motor carrier witnesses also presented evidence to show specific instances where they suffered diversion of shipments to Rexco.

Finally, Complainants presented the testimony of Mr. William E. Johns, Director of American Trucking Associations, Inc.'s Safety Department.<sup>28/</sup> Mr. Johns testified concerning violations of the safety regulations of the Department of Transportation as reflected on the logs submitted to Rexco by its drivers.

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<sup>25/</sup> Robert J. Franco, Ex. 1, App. 13, Tr., pp. 567-743  
Lonnie G. Howard, Ex. 1, App. 14, Tr., pp. 1263-1410

<sup>26/</sup> Neil DuJardin, Ex., 1, App. 44, Tr., pp. 751-839  
H. L. Patterson, Ex. 1, App. 17, Tr., pp. 846-901  
Richard Allish, Ex. 1, App. 42, Tr., pp. 905-991  
James B. Nestor, Ex. 1, App. 16, Tr., pp. 994-1054  
Robert Hollenbach, Ex. 1, App. 40, Tr., pp. 1055-1121  
Rex Joyner, Ex. 1, App. 34, Tr., pp. 1121-1159  
Arthur L. Belford, Ex. 1, App. 15, Tr., pp. 1162-1226  
Vernon Crenshaw, Ex. 1, App. 30, Tr., pp. 1227-1233  
Michael Zell, Ex. 1, App. 36, Tr., pp. 1234-1250

<sup>27/</sup> Exhibit 1, App. 16  
Exhibit 1, App. 15

<sup>28/</sup> Exhibit 1, App. 24, Tr., pp. 1417-1650, 1697-1841, 1852-1883



Since the issue of REA's failure to prosecute was treated as a question of law, Complainants did not present any witnesses. Instead, they relied on the previous statements made by REA and the obvious fact; that over eight years had gone by without REA's taking any positive steps to present its first piece of evidence. The evidence introduced by Complainants consisted of true copies of REA's application filed March 2, 1971, in Docket No. MC-66562 (Sub-No. 2337 TA), as well as other pleadings filed therein.<sup>29/</sup> This evidence documented the contentions contained in the "Argument and Evidence" filed August 23, 1976,<sup>30/</sup> and proved that REA, after initially touting the hub system as being the "only solution" to its woes, had, between two and three years later, reanalyzed the hub concept and repudiated it.

REA's reanalysis followed a change in REA management. This was explained in the 1971 application at page 2 as follows:

In August 1969, a group of investors headed by REA's new management acquired control of REA Express from its railroad owners. The new management has exerted every effort to make the Hub system adequate for REA and the public in REA's historic nationwide service area. Extensive operational improvements have been combined with strong sales effort and major marketing innovations. But the Hub system nevertheless has proved to be both costly and inefficient for REA, and inadequate in providing service to the public. Confronted with the need to proceed with the Hub case, REA's new management began an analysis of the system and concluded that it did not fit REA's public service and operational requirements.

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<sup>29/</sup> Exhibit 3, J.A., p. 381.

Exhibit 4, "Reply of REA Express, Inc. to the Protests of Various Motor Carriers and their Associations," J.A., p. 408.

Exhibit 5, "Petition of REA Express for Reconsideration," J.A., p. 432.

<sup>30/</sup> C.I. No. 56, J.A., pp. 169-249.



As part of their review REA's new management retained the A.T. Kearney & Company, Inc., which authored an "Analysis of REA Motor Vehicle Operating Authority" that was attached to REA's Sub-No. 2337 TA as Appendix A. In the Kearney Report, it was concluded, as summarized by REA at page 3 of its "Statement in Support of Application," that "there is no way that REA's present authority [the hub authority] can be used to provide the flexible, efficient, economical service required for express operations in today's world."<sup>31/</sup>

REA also claimed in its application that "[t]he inadequacies and lack of flexibility of REA's existing authority have penalized the shipping and receiving public as well as REA."<sup>32/</sup> REA continued, "[c]ostly, inefficient operations under the Hub authority and the resulting inadequate service and declining volume have placed express service, and REA, in a true emergency situation." Finally, REA referred to the hub as an "outmoded railroad-oriented authority" that "was not the result of scientific analysis of the kind of system needed to fulfill the public need," but instead "was a panicky response of a management subservient to railroad owners."<sup>33/</sup>

In the supporting documents filed by REA, it was specifically claimed that "[t]he deficiencies in the Hub authority have

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<sup>31/</sup> See Exhibit 3, "Statement in Support of Application," p. 3, J.A., p. 387. For the entire text of the Kearney Report, see Exhibit A, attached to Exhibit 3, J.A., pp. 399-407.

<sup>32/</sup> Id., at 4, J.A., p. 4.

<sup>33/</sup> Id., at pp. 8 and 13, J.A., pp. 392 and 397.



become only too apparent after three years of operation,"<sup>34/</sup> and that "[w]ith its wasteful circuitry and backhauls the Hub authority comes closer to insuring the maximum rather than the minimum highway transit time."<sup>35/</sup> REA also characterized the hub authority as being "outmoded,"<sup>36/</sup> and indeed emphasized as grounds for its new application, "the total inadequacy of its motor operating authority which deprives the shipping public of critically needed small shipments express service and imposes costly operating and financial burdens on REA."<sup>37/</sup> Finally, REA concluded:

But for REA to pursue to conclusion the permanent application in the Hub case would do the Commission, the public and REA a considerable disservice. For experience demonstrates that the Hub authority precludes REA from providing to the public a modern, efficient and economical express service. The present and future of shippers and REA depends on replacing the Hub and other bits and pieces of motor operating authority it holds with the authority sought herein. Rather than imposing a burden on the Commission, REA's present application will avoid the necessity of a hearing on the Hub authority --which events have shown cannot do the job-- as well as the numerous pending atomized bits and pieces of regular route authority. For REA will dismiss the Hub proceeding and all other pending applications for motor operating authority upon final approval of the grant of the authority sought. <sup>38/</sup>

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<sup>34/</sup> Exhibit 4, p. 2, J.A., p. 413.

<sup>35/</sup> Id., pp. 8-9, J.A., pp. 419-420.

<sup>36/</sup> Id.

<sup>37/</sup> Exhibit 5, p. 2, J.A., p. 437.

<sup>38/</sup> Id., p. 13, J.A., p. 448.



In addition to those witnesses presented by Complainants, the Commission's Bureau of Enforcement also presented evidence concerning the Rexco operations. The first witness was a presently employed Rexco sales agent.<sup>39/</sup> Significantly, his testimony corroborated the evidence previously introduced by the former sales agents sponsored by Complainants. The other witness introduced by the Bureau was an investigator with the Commission's Bureau of Operations, Louis P. Bussolati, Jr., who had conducted an extensive investigation of the Rexco operation. Based upon this investigation, he presented evidence to show that the Rexco operations did not conform to the basic indicia of express service, including the failure to observe regular routes; the failure to confine operations to those requiring ordinary van-type equipment; and the providing of service on an unscheduled, call-on-demand basis.<sup>40/</sup> In addition, at the oral hearing it was established through this witness that Rexco had violated several requirements in its governing tariff publication, including the failure to issue a Uniform Express Receipt or Uniform Express Bill of Lading.<sup>41/</sup>

Following the closing of Complainants' portion of the case, REA commenced its presentation. REA did not present any witness with knowledge of the Rexco operation, but instead limited its evidence to a presentation of certain facts about REA's past operation. As part of its defense it presented

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<sup>39/</sup> Joseph Carretta, Tr., pp. 1650-1688

<sup>40/</sup> See Exhibit No. 18, Tr., pp. 1896-2264, J.A., pp. 498-527.

<sup>41/</sup> Tr., pp. 2226-2234; J.A., pp. 560-567.



two former REA employees. One, the senior tariff compiler for REA, <sup>42/</sup> presented testimony concerning the publication of a limited number of volume rates previously established by REA for particular shippers. He also testified that REA never published a tariff containing truckload rates on a mileage scale with general applicability, thus repudiating any claim that the Rexco tariff had an historical antecedent in the past REA tariffs. REA's other witness, <sup>43/</sup> the former System Manager, Line-Haul Services, testified concerning REA's past line-haul operations. As a review of that testimony will show, it corroborated previous testimony presented by Complainants' witnesses and demonstrated the abrupt departure of the Rexco operation from the type of operation previously performed by REA.

In addition to the testimony presented by the two witnesses, REA submitted certain "admissions and/or stipulations of fact" as evidence over the repeated objections of Complainants. <sup>44/</sup> These admissions consisted of 126 paragraphs containing paraphrased statements taken from previous Commission reports which REA insisted be admitted as facts in the instant proceeding. At that point the defense rested.

After the closing of oral hearing, all parties were ordered to file posthearing briefs by October 18, 1976. <sup>45/</sup>

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<sup>42/</sup> Thomas G. Miano, Tr., pp. 2315-2356

<sup>43/</sup> Jay R. Sumner, Exhibit 31, Tr., pp. 2398-2436

<sup>44/</sup> Ex. Nos. 24, 32-34, C.I. No. 113, J.A., pp. 570-605.

<sup>45/</sup> C.I. Nos. 115, 116, 117 and 118,



In addition, all parties were permitted to file reply briefs by October 26, 1976.<sup>46/</sup>

### THE COMMISSION'S REPORT

On November 19, 1976, the entire Commission, recognizing the importance of prompt disposition of these proceedings, omitted the Administrative Law Judge's Initial Decision and served its own unanimous Report and Order.<sup>47/</sup> In this Report the Commission discussed at length the various contentions raised by the parties, as well as the evidence. Based thereon, the Commission found that REA had violated its special rules of practice (49 C.F.R. §1100.247 (f)) by failing within the past eight years to either prosecute or dismiss its pending permanent authority application in Docket No. MC-66562 (Sub-No. 2345) (Part 181) and, accordingly, dismissed the application. In addition, the Commission revoked the corresponding temporary authority in Docket No. MC-66562 (Sub-No. 2308 TA), pursuant to its rules and regulations (49 C.F.R. §1101), which require termination of a temporary authority upon final determination of the related permanent authority application.<sup>48/</sup> As an alternative the Commission found that even if it had not dismissed the permanent authority application for want of prosecution that "ample cause otherwise exists for the prompt revocation of the Sub-No. 2308 temporary authority."<sup>49/</sup> This finding was predicated

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<sup>46/</sup> C.I. Nos. 119, 120, 121 and 122

<sup>47/</sup> C.I. No. 125. Commissioner O'Neal concurred, while Commissioner Corber did not participate. J.A., pp. 709-732.

<sup>48/</sup> Id., at p. 20, J.A., p. 728.

<sup>49/</sup> Id., at p. 21, J.A., p. 729.



on the Commission's finding that REA, as a bankrupt and liquidated carrier, was both operationally and financially unfit. This finding also reflected the Commission's conclusion that the Rexco operations were totally illegal and were in willful violation of REA's outstanding authorities. Finally, the Commission concluded that a cease and desist order should be entered requiring the immediate cessation of Rexco operations.<sup>50/</sup>

Thereafter, REA and Alltrans filed petitions seeking reconsideration of the Commission's Order.<sup>51/</sup> By these petitions REA and Alltrans challenged the Commission's findings insofar as the Commission decided that the permanent authority application should be dismissed and the corresponding temporary authority revoked. They also challenged the Commission's finding of willfulness. They did not seek reconsideration of the Commission's findings concerning specific types of violations, and specifically did not challenge the factual accuracy of any of those findings. In addition, the Brotherhood of Railway and Airline Clerks (hereinafter "BRAC") and one other group of former employees filed petitions seeking to intervene, for reconsideration of the Commission's Order and modification of the effective date of the Commission's Order.<sup>52/</sup> BRAC likewise limited its participation to the question of the dismissal of the permanent application and revocation of the corresponding temporary authority. BRAC's

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<sup>50/</sup> Id., at p. 19, J.A., p. 727.

<sup>51/</sup> C.I. Nos. 134 and 147, J.A., pp. 744-780.

<sup>52/</sup> C.I. Nos. 126-130 and 148, J.A., pp. 733-743.

petitions were opposed by various Complainants and the ATA.<sup>53/</sup>  
 Thereafter, the Complainants filed their replies contending the  
 Commission had correctly ruled and should affirm its prior  
 Order.<sup>54/</sup>

By Order served January 28, 1977, the entire Commission,  
 with one Commissioner concurring, after considering various  
 arguments raised by Petitioners, unanimously denied the petitions  
 to intervene, reaffirmed each of its prior findings and denied  
 further relief.<sup>55/</sup> This exhausted the administrative remedies.

Pending the Commission's determination of their petitions  
 seeking reconsideration, Petitioners sought a stay from the  
 Commission.<sup>56/</sup> By Order served December 17, 1976,<sup>57/</sup> the  
 Commission unanimously denied the stay and the instant suit was  
 filed. By Order served January 5, 1977, the Commission's decision  
 was stayed by this Court pending judicial review.

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<sup>53/</sup> C.I. Nos. 141, 142, 142.1, 149 and 166, J.A., p. 781.

<sup>54/</sup> C.I. Nos. 205, 206, 207, 208 and 209, J.A., p. 792.

<sup>55/</sup> C.I. No. 242, J.A., pp. 838-842.

<sup>56/</sup> C.I. No. 134, J.A., p. 744.

<sup>57/</sup> C.I. No. 140



ARGUMENT

## I.

THE COMMISSION'S DISMISSAL, PURSUANT TO ITS SPECIAL RULES OF PRACTICE, OF REA'S EIGHT-YEAR-OLD APPLICATION FOR FAILURE TO PROSECUTE IS SUPPORTED BY THE EVIDENCE OF RECORD AND IS PROPER IN ALL RESPECTS

In this proceeding the primary issue is whether the Commission abused its discretion in dismissing a permanent authority application filed by REA in 1968 which had lain fallow and unprosecuted on the Commission's docket for over eight years. It is Respondents' position that REA's unexplained and unjustified failure either to prosecute the application within such eight-year period or seek its dismissal, as directed by Rule 247(f) of the Commission's Special Rules of Practice, 49 C.F.R. §1100.247, is a violation of such rule and, therefore, the Commission's dismissal of that unprosecuted application is correct in all respects.

It is well-settled in this Circuit that the dismissal of a case for want of prosecution by a district court will not be disturbed on appeal absent a showing of abuse of discretion. Joseph Muller Corporation Zurich v. Societe Anonyme de Gerance et D'Armement, 508 F.2d 814 (2d Cir. 1974); Petnel v. American Telephone and Telegraph Company, 434 F.2d 645 (2d Cir. 1970); and Taub v. Hale, 355 F.2d 201, 202 (2d Cir. 1966), cert. denied, 384 U.S. 1007 (1966).

While the above cases arose under Rule 41(b) of the Federal Rules of Civil Procedure, the same considerations apply to the decision of the Interstate Commerce Commission. The Commission's



Rule 247(f) reads, as herein pertinent, as follows:

An applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof.

In dismissing an application for failure to prosecute under its Rule 247(f)<sup>1/</sup> and thereby clearing its calendar of cases that have long remained dormant because of the inaction or dilatoriness of applicants, the Commission's interest is identical to that of courts seeking to manage their affairs so as to achieve the orderly and expeditious disposition of cases.<sup>2/</sup>

1/ In reviewing the Commission's interpretation of its own rule, the Court should bear in mind the long-standing principle, as stated by the three-judge District Court in *Baltimore and Ohio Railroad Company v. United States*, 391 F.Supp. 249, 257 (E.D. Pa. 1975), that "Courts have always shown great deference for the construction placed upon an administrative rule by the agency charged with its promulgation and administration. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed. 2d 616 (1965)."

2/ Alltrans' claim (Br., p. 11) that the Commission "under the language of 49 U.S.C. §17(3) refused to follow orderly procedure in order to destroy the very authorities essential to maintenance of express service utilized by the public up to 1976," is patently specious. As the Commission's Orders, C.I. 125, pp. 21-22, J.A., pp. 729-730, and C.I. 242, p. 3, J.A., p. 840, reflect, the Commission carefully explained its decision not to permit Alltrans to be substituted as applicant. Apart from those considerations which are discussed *infra*, at p. 44, it should be remembered that it was REA that voluntarily ceased express operations and commenced liquidation proceedings in November 1975. Furthermore, Alltrans' claims of abuse of discretion must be viewed in light of the fact that its application to purchase was entered into with full knowledge of the complaint proceedings and the ATA petition, but yet was not filed until after the oral hearing had concluded. Since, as recognized by the Commission, *id.*, the instant proceeding involved the determination of several issues concerning what is permitted under the REA authorities, the Commission correctly concluded that the disposition of such issues herein properly preceded disposition of any potential application that might be filed by Alltrans. It is respectfully submitted that the Commission properly exercised its discretion under 17(3). Compare, *F.C.C. v. Schreiber*, 381 U.S. 279, 289 (1965); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); and *City of San Antonio v. C.A.B.*, 374 F.2d 326, 329 (D.C. Cir. 1967).



Hence the burden is upon the Petitioners to demonstrate that the Commission has abused its discretion and misapplied its power. This they have not done. As a review of the record and Petitioners' briefs reveals, the Petitioners' position that REA intended to prosecute its application is based on comments of REA's counsel at a prehearing conference held in 1970 concerning REA's intention and ability to proceed to hearing.<sup>3/</sup> At this conference, held on January 12, 1970, the day on which the Commission had originally scheduled the commencement of the evidentiary hearing, the REA spokesman, while professing to be ready to go forward in four months, was unable to provide the Commission with anything other than broad generalizations reflecting little substantive knowledge of the proposed operation - even though REA had been operating under the hub system for nearly 20 months pursuant to temporary authority.<sup>4/</sup> Nevertheless, it was decided that the hearing would commence in May 1970. However, that hearing never took place.

Instead, as demonstrated by the evidence submitted by the Respondents,<sup>5/</sup> REA, which had undergone a change in management, returned to the Commission on two separate occasions in 1971 and

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<sup>3/</sup> Of course, counsel's comments (Br., p. 36) concerning "applicant's current desire to prosecute" are patently specious. At best, Alltrans, not REA, would be the applicant. As recognized by the Commission, REA, which has disposed of its equipment and facilities, simply cannot be considered a viable applicant.

<sup>4/</sup> See Docket No. MC-66562 (Sub-No. 2345) (Part No. 181), C.I. No. 197, J.A., pp. 888-949.

<sup>5/</sup> Exhibits 3, 4 and 5, J.A., pp. 381, 408 and 432.



filed applications seeking new irregular-route authority which would replace the hub system, which, on the basis of three years of operations under that temporary authority, had been found by REA to be unworkable. In these pleadings REA represented to the Commission that "[c]ostly, inefficient operations under the Hub authority and the resulting inadequate service and declining volume have placed express service, and REA, in a true emergency situation."<sup>6/</sup> It also claimed that "there is no way that REA's present authority [the hub authority] can be used to provide the flexible, efficient, economical service required for express operations in today's world."<sup>7/</sup> REA also testified that the inadequacies and lack of flexibility of the hub authority "have penalized the shipping and receiving public as well as REA."<sup>8/</sup>

<sup>9/</sup>  
Finally, REA concluded:

But for REA to pursue to conclusion the permanent application in the Hub case would do the Commission, the public and REA a considerable disservice. For experience demonstrates that the Hub authority precludes REA from providing to the public a modern, efficient and economical express service. The present and future of shippers and REA depends on replacing the Hub and other bits and pieces of motor operating authority it holds with the authority sought herein. Rather than imposing a burden on the Commission, REA's present application will avoid the necessity of a hearing on the Hub authority--which events have shown cannot do

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<sup>6/</sup> Exhibit 3, p. 12, J.A., p. 396.

<sup>7/</sup> Id., p. 4., J.A., p. 388.

<sup>8/</sup> Id.,

<sup>9/</sup> Exhibit 5, p. 13, J.A., p. 448.



the job--as well as the numerous pending atomized bits and pieces of regular route authority. For REA will dismiss the Hub proceeding and all other pending applications for motor operating authority upon final approval of the grant of the authority sought.

This application was denied by Order served August 12, 1971.

Subsequently, the Commission in REA Express, Inc., Application for Emergency Temporary Authority, 117 M.C.C. 80, 89-90 (1971), denied REA's second application to replace the hub system and made this pertinent observation:

REA's present management has had ample time to prepare and file an application for permanent irregular-route authority, which would afford a proper means of determining the extremely serious questions posed. They have chosen not to do so. Rather, they have presented to us a series of continuing "emergencies," asking that we ignore anything but cursory consideration of the issues, and attempting to ascribe managerial failures to this Commission's refusal to accede to whatever REA might now desire.

During its more than 3 years of operations in the "Hub" system (pursuant to temporary authority), REA has, it now relates, discovered certain areas in which service cannot be performed efficiently. Not once did REA seek to rectify these service deficiencies by seeking additional or more efficient route authorizations.

REA has, instead, permitted its problems to mount to the point where it now comes before us with an "emergency" essentially of its own making insofar as its operational structure is concerned. In these circumstances, we simply cannot grant REA's latest request without closing our eyes to the overall public interest.

Thereafter, while REA continued to operate under the hub configuration until November 1975, no attempt was ever made by REA to prosecute the application. However, the Commission, aware that it would force REA into bankruptcy if it pushed it to hearing, did not require REA's new management to prosecute the application formulated by its predecessor.



In spite of the Commission's restraint, REA in November 1975 voluntarily placed a total embargo on all express shipments and ceased operations. Shortly thereafter, liquidation of REA's operating equipment and facilities commenced, rendering REA wholly incapable of reinstituting its traditional express service. Only then did the Commission act to dismiss the pending application.

With the above facts in mind, it is clear that Petitioners' reliance on statements made in 1970, which predated the new management's analysis of the hub system, is simply misplaced. No weight can be given to REA's outdated expressions of an intent to proceed since such expressions were negated, not only by the passage of six additional years of inactivity, but also by REA's new management's explicit rejection of the hub system in the subsequently filed applications. In short, the record is barren of any probative evidence that would justify REA's unexplained failure to prosecute. When the long, drawn-out history of the proceeding is reviewed, it must be concluded that the Commission's decision to dismiss the stale, unprosecuted application is supported by the evidence of record and is not an abuse of discretion.

Nor is there merit to Petitioners' contention that REA was merely awaiting an order from the Commission setting a hearing date, and since the Commission did not force REA to a hearing by issuing a further order, REA was under no obligation to proceed.<sup>10/</sup>

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<sup>10/</sup> The Commission's reason for not holding REA's feet to the fire stems from its awareness that REA was not able to go forward. See the Commission's Order, served November 19, 1976, C.I. No. 125, p. 20, J.A., p. 728; and Order served January 28, 1977, C.I. No. 242, p. 4, J.A., p. 841.



Such a construction, which is wholly unsubstantiated by the record herein, stands Rule 247(f) on its head. This rule, which places an affirmative duty on an applicant either to prosecute or seek dismissal, cannot be rationally construed in the manner urged by Petitioners.<sup>11/</sup> REA, and not the Commission or the Protestants, must be held accountable for its procrastination. Compare, S & K Airport Drive-In, Inc. v. Paramount Film Distribution Corp., 58 F.R.D. 4, 7 (E.D. Pa. 1973), aff'd, 491 F.2d 751 (3rd Cir. 1973); and Bendix Aviation Corporation v. Glass, 32 F.R.D. 375, 377-378 (E.D. Pa. 1961).

Petitioners as a matter of law cannot claim, as Alltrans in particular has attempted (Br., p. 13),<sup>12/</sup> that "to constitute 'failure to prosecute' requires proof of failure to comply with an order or to discharge some legal obligation with respect to the application." This contention fails in light of REA's duty to prosecute under Rule 247(f) and the Supreme Court's holding in Link v. Wabash Railroad Company, 370 U.S. 626, 632 (1962), that:

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11/ REA and Alltrans give Rule 247(f) a strained interpretation. They would seek to read the two pertinent sentences of that Rule as being wholly dependent upon one another so that the affirmative obligation imposed upon the applicant by the first sentence, to either prosecute or dismiss, does not arise until the Commission, by operation of the second sentence, issues an order requiring the applicant to move forward. Such an interpretation would obviate any applicant's duty or responsibility to timely prosecute an application, and would thereby render the first operative sentence of the Rule meaningless.

12/ REA also suggests this argument when it states (Br., pp. 30 and 39) REA did not fail to meet requirements of any order issued by the Commission.



Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Anderson National Bank v. Lockett, 321 U.S. 233, 246, 64 S.Ct. 599, 606, 88 L.Ed. 692. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

REA should have been aware that its failure to prosecute its application would eventually be grounds for the Commission's exercise of its power to dismiss. Having taken no steps to prosecute this application for over eight years and in light of its subsequent repudiation of that application, REA cannot claim that the Commission's refusal to reward it for its procrastination by not dismissing the application following its bankruptcy and liquidation is an abuse of discretion.

In short, the Petitioners cannot demonstrate any error in the Commission's ultimate conclusion,<sup>13/</sup> that:

The Commission must not passively burden the administrative process by failing to recognize factors concerning the probability that a bankrupt and liquidated carrier will not and cannot prosecute its outstanding applications. There is no rationale for failing to dismiss pending applications under such circumstances,

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<sup>13/</sup> C.I. No. 125, p. 20, J.A. p. 728.



unless there is some positive showing that can persuade us otherwise. This is especially true where the concept of the application involves unique factors and considerations and where it is shown that the proposed operation is, in all probability, not feasible and there is little probability that the application would or could be successfully prosecuted.

We conclude that no reasons are shown to exist at this point in time to allow the continued pendency of the unprosecuted REA "Hub System" permanent application, that dismissal of this application will not be inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy and, accordingly, we will order dismissal of that application.

This reasoning, as has been demonstrated, is supported by the relevant evidence of record and is a proper exercise of the Commission's function to appraise the facts and draw inferences therefrom. The Commission's decision to dismiss should be summarily affirmed.



## II.

THE COMMISSION CORRECTLY FOUND THAT  
THE TEMPORARY AUTHORITY SHOULD BE  
REVOKED AS A MATTER OF LAW

In holding that the hub temporary authority, under which REA had operated from June 1968 to November 1975, should be revoked, the Commission stated:<sup>14/</sup>

The temporary authority currently outstanding in Sub-No. 2308 TA must be revoked inasmuch as the continuation of temporary authority is conditioned upon the pendency of a corresponding permanent authority application (49 C.F.R. §1101), and, we have concluded herein to dismiss that corresponding application.

This is the primary basis for the Commission's revocation of the hub temporary authority. However, as a review of the Petitioners' briefs will reveal, it has been completely ignored in favor of a rambling attack on the Commission's finding of "willfulness" which REA erroneously states is "the basis for revocation." Even if the Commission's finding of willful violations were considered erroneous, under the Commission's governing regulations a temporary authority automatically collapses as a result of the dismissal of the permanent application and all operations under the corresponding temporary authority must cease upon the effective date of the Commission's administratively final order. As set forth at 49 C.F.R. §1101.1(a):

(a) Any temporary operating authority granted under 210a(a) or 311(a) of the Interstate Commerce Act (49 U.S.C. 310a(a)), 911(a) is continued in force, beyond the

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<sup>14/</sup> C.I. No. 125, p. 20, J.A., p. 728.



expiration date specified in such temporary operating authority, until the determination of an application filed by the holder of such temporary operating authority for a certificate of public convenience and necessity or a permit to engage in operations authorized by such temporary operating authority.

There is no challenge to the Commission's stated reliance on this regulation. Thus, should this Court decide that the Commission did not abuse its discretion in dismissing the permanent authority application, it need not consider any of the remaining issues raised by the Petitioners.



## III.

THE COMMISSION'S CONCLUSION THAT THE  
REXCO OPERATIONS WERE IN THE NATURE  
OF WILLFUL VIOLATIONS HAS A RATIONAL  
BASIS AND IS SUPPORTED BY SUBSTANTIAL  
EVIDENCE IN THE RECORD AS A WHOLE

The entire issue of willfulness should be placed in its proper perspective in this proceeding. As previously noted, the Court need not reach this issue in the event it finds that the Commission properly exercised its discretion in dismissing the hub application for lack of prosecution. Even then, "willfulness" is pertinent only in response to Petitioner's claim that it was entitled to the specific notice and compliance procedures under Section 558(c). However, as will be argued infra (pp. 57-58), as this Court has previously recognized,<sup>15/</sup> and as the Commission found in its Order of January 28, 1977,<sup>16/</sup> the requirements of Section 558(c) do not apply "in cases of willfulness."

- A. The uncontroverted evidence of record demonstrates that REA's Rexco division's operations were conducted with intentional disregard and plain indifference to the terms and limitations of its authorities and to the regulations of the Commission and Department of Transportation.

In finding that REA, through its Rexco division,<sup>17/</sup> had engaged in operations that constitute willful violations of the

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<sup>15/</sup> Dlugash v. SEC, 373 F.2d 107, 110 (2d Cir. 1967)

<sup>16/</sup> C.I. No. 242, p. 5; J.A., p. 842.

<sup>17/</sup> Although REA asserts (Br., p. 40) that the Rexco operation was only "a minor aspect of the overall REA operation," it must be remembered that at the time of the filing of the complaints, the Rexco operations constituted the entirety of REA's operations.



explicit terms of REA's certificates, the basic indicia of express service, the requirements of REA's governing tariffs, the rules and regulations of the Commission and the Department of Transportation, and the Interstate Commerce Act, the Commission correctly evaluated the evidence and relevant statutory considerations. Since the Petitioners do not contest the validity of the Commission's findings with regard to the violations by Rexco, such violations must be considered as being established facts. Accordingly, the only issue presented on review is whether the Commission properly determined that such uncontested violations establish willfulness. Should the Court deem it necessary to reach this issue, it will find that the Commission's determination of willfulness is overwhelmingly supported by substantial, uncontroverted evidence of record and is rational in all respects.

In order to ascertain the magnitude of the violations, one need only turn to the Commission's Initial Report at pages 15-19.<sup>18/</sup> There the Commission listed at length the various violations that ultimately caused it to conclude that "[t]he Rexco operations have been totally illegal . . ." and that "the Rexco operation has been conducted in such a manner that it completely lacks even a minimal attempt to conform with the well-established indicia of express service." These violations, which are thoroughly documented by uncontroverted evidence, include, among others, service at unauthorized points, the failure to observe the regular routes, the failure to inspect the

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<sup>18/</sup> C.I. No. 125, pp. 15-19, J.A., pp. 723-727.



trip-lease vehicles, the failure to comply with Department of Transportation safety regulations, including the falsification of drivers' logs and the violation of hours of service limitations, and the failure to comply with governing tariff regulations. These violations clearly reflect REA's intentional disregard and plain indifference both to the terms and limitations of its certificates and temporary authorities, which are restricted to the movement of "general commodities, moving in express service, over regular routes," and to the regulations of the Commission and Department of Transportation.

While REA now attempts to claim that it did attempt to comply but was "confused" by the lack of "known standards," Respondents urge the Court to review this assertion, as well as those pertaining to the Trustee's alleged concern that the Rexco division's operations remain within the bounds of the law, against the following backdrop.<sup>19/</sup> As noted, REA's authorities are limited to regular-route operations.<sup>20/</sup> Yet at the hearing it was firmly established that Rexco never gave its sales agents any instructions concerning the routing of traffic,<sup>21/</sup> but, rather, drivers were

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<sup>19/</sup> For a detailed discussion of the evidence concerning the Rexco violations, the Court's attention is invited to the "Post-hearing Brief of Complainants," pp. 20-62. C.I. No. 116; J.A., pp. 630-672.

<sup>20/</sup> Every authority issued to REA sets out in simple English the exact routes that must be traversed. For example, REA, in offering service between Albany, NY, and Binghamton, NY, was required to move from Albany over U.S. Highway 20 to junction New York Highway 7, thence over New York Highway 7 to Binghamton, and return over the same route. MC-66562 (Sub-No. 1923 T.A.).

<sup>21/</sup> C.I. No. 56, Exhibit 1, Appendices 3 at p. 7; 4 at p. 3; 5 at p. 3; 6 at p. 3; 7 at p. 2; 8 at p. 2; and 29 at p. 4; J.A., pp. 263, 271, 282, 287, 294, 297 and 308.



given complete discretion to take the "shortest and best" and "most direct" routes, or simply told to use the Interstate Highway System.<sup>22/</sup> As a result Rexco operated as an irregular-route carrier.<sup>23/</sup> However, in 1971 the Commission specifically held in REA Express, Inc., Application for E.T.A., 117 M.C.C. 80, 88 (1971):

[E]xpress service, whatever else it may be, must be performed as an expedited, regular-route service. Such service is operationally inconsistent with irregular-route service which, in the usual concept, envisions a "call-on-demand," unscheduled operation.

When the Commission's Order is considered, it is clear that there is no confusion about the absolute requirement to operate over authorized regular routes. It is specious to even suggest that a need exists for further clarification of the issue.

In addition, the Court's attention is invited to the un rebutted testimony of a Rexco employee<sup>24/</sup> that:

In my duties of accepting loads for movement, I was advised that Rexco could move loads to all points east of Denver. At a later point, Mr. Smith advised me to avoid Arkansas and Minnesota as Rexco was apparently having legal problems in those states. Mr. Smith never mentioned regular routes or express service to me. At one point, he told me that even though Rexco was being investigated, it would take two or three years before the Commission or the Courts could close us down.

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<sup>22/</sup> C.I. No. 56, Exhibit 1, Appendices 3 at p. 7; 4 at p. 8; 5 at p. 4; 6 at p. 3; 7 at p. 2; and 8 at p. 3. Also see Tr., pp. 126, 217, 331, 351, 399-400 and 1656. J.A., pp. 263, 276, 282, 287, 297, 309, 328, 330, 337, 346, 348-349 and 478.

<sup>23/</sup> See C.I. No. 56, Exhibit 1, Appendix 9; J.A., p. 304.

<sup>24/</sup> C.I. No. 56, Exhibit 1, Appendix 29, p. 4; J.A., p. 308.



The attitude conveyed by this sworn testimony is certainly not one of a carrier carefully conducting its business so as to conform with the limits of its authorities. Rather, it is a clear indication that REA intended to push full-steam ahead until it was forced to stop.

Also, the Rexco operations were shown to be in serious violation of the Commission's leasing regulations. Regulation 49 C.F.R. §1057.4(c) states that:

It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier, in order to insure that the said equipment complies with the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

At the oral hearing it was discovered that Rexco for over nine months and with knowledge that it was happening, permitted Mrs. Mary Ann Campbell, an employee of its sales agent at Portage, Indiana, to sign the equipment inspection report even though she was not making such inspections. As she admitted in response to a question by the Administrative Law Judge, "I signed the inspections, but I did not perform them."<sup>25/</sup> She also admitted, while answering the question of "who did" the inspections, that "no one" had done them. She further testified<sup>26/</sup> that her superior was aware that no inspections were being made. Finally, on cross-examination she testified that she had even mentioned to her employer "a time

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<sup>25/</sup> Tr., p. 239, J.A. p. 332.

<sup>26/</sup> Tr., p. 276, J.A. p. 333.



or two that there should be someone set up to do it, but it wasn't done." REA did not present any witnesses to rebut this testimony.

Another example of Rexco's deliberate and knowing disregard for the governing regulations is found in the testimony of Mr. Stewart, one of the former Rexco sales agents. He testified that a driver who was already in violation of the DOT Safety Regulations, by driving in excess of the time permitted, was instructed by Rexco headquarters to move a load despite this fact.<sup>27/</sup> Furthermore, Rexco has sent memoranda to drivers requesting them to correct their logs to remove violations and resubmit them. As Mr. Johns testified,<sup>28/</sup> demanding drivers to change their logs to reflect specific hours, etc., after they have previously been submitted as true and accurate, is, in effect, requiring drivers to falsify the logs. It should be observed that a failure on the part of the carrier to require drivers to fill out accurate logs also constitutes a willful violation by the carrier and subjects the carrier to criminal prosecution. U.S. v. Matlack, 149 F.Supp. 814 (D. Md. 1957); U.S. v. Sawyer Transport, Inc., 337 F.Supp. 29 (D. Minn. 1971), aff'd per curiam, 463 F.2d 175 (1972).

Another example of willfulness is provided by REA's disregard for the Commission's observation in REA Express, Inc., Application for E.T.A., supra, 117 M.C.C. at 89, that:

[O]ne index of express service is that the carrier must perform actual operations between all authorized points upon firmly established schedules

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<sup>27/</sup> Tr., pp. 309-311, J.A., pp. 334-336.

<sup>28/</sup> Tr., pp. 1541, 1546, 1550-1551, J.A., pp. 474, 475, 476-477.



allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins which in practice are not changed, except after substantial notice to the general public. (Emphasis in original.)

Rexco's operations satisfied none of these criteria.

Initially, it was uncontroverted that Rexco did not operate upon any firmly established schedules. As various Rexco sales agents testified, they did not have firmly established schedules of pickups, deliveries or line-haul movements,<sup>29/</sup> except in the sense that a shipper would call and advise them that a load would be available for pickup.<sup>30/</sup> In other words, scheduling resulted from the shippers' initiative and not from Rexco's. This, of course, is the essence of a call-on-demand service,<sup>31/</sup> and is clearly distinguishable from the prior REA service where shippers were given copies of REA's schedules.<sup>32/</sup>

As the above demonstrates, Rexco operations were launched in deliberate defiance, and not merely "careless disregard," of the Commission's Orders, the limitations contained in each of its authorities and governing regulations. REA's conduct is encompassed by the definition of "willfully" established by the United States Supreme Court in United States v. Illinois Central Railroad Co.,

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<sup>29/</sup> C.I. No. 56, Exhibit 1, Appendices 3 at p. 6; 4 at p. 7; 5 at p. 4; 6 at p. 4; 7 at p. 2; 8 at p. 3; and 29 at p. 3; J.A., pp. 262, 275, 283, 288, 298 and 307.

Also see Tr., pp. 238 and 531; J.A., pp. 331 and 353.

<sup>30/</sup> See Tr., pp. 175, 368, 522, 531 and 552; J.A., pp. 329, 347, 352, 353 and 354.

<sup>31/</sup> C.I. No. 56, Exhibit 1, Appendices 3 at p. 6; 4 at p. 8; 5 at p. 3; 6 at p. 4; and 8 at p. 3; J.A., pp. 262, 276, 282, 288 and 298.

<sup>32/</sup> Tr., pp. 1357-1358; J.A., pp. 462-463.



303 U.S. 239, 243 (1943), and followed by the Commission. As the Commission recently stated in Schreiber-Investigation of Operations & Revocation of Certificates, 125 M.C.C. 552, 564 (1976):

The Supreme Court, on considering the meaning of the term "willful" as used in regulatory statutes in the landmark case of United States v. Illinois Cent. R. Co., 303 U.S. 239, 243 (1938), approved the conclusion that "willfully" "\* \* \* means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Under this interpretation it is not necessary that the violations charged be motivated by an evil purpose or a criminal intent, nor that there be a purpose to act contrary to a specific statutory requirement. It is only required that some culpability be present such that the conduct in question is other than unwitting.

Compare, Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961); Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (2d Cir. 1965); United States v. Peltz, 433 F.2d 48 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971); Intercounty Construction Company v. Occupational Safety and Health Review Commission, 522 F.2d 777, 779-780 (4th Cir. 1974), cert. denied, 96 S.Ct. 854 (1976); and Schwebel v. Orrick, 153 F.Supp. 701, 705 (D.D.C. 1957), aff'd, 251 F.2d 919 (D.C. Cir. 1958), cert. denied, 356 U.S. 927 (1958).

B. Petitioner's reliance on private conversations which are not part of the record is misplaced.

Nor has REA pointed to any mitigating facts of record that would tend to rebut the Commission's finding. While REA attempts to rely on certain private conversations with Commission



employees,<sup>33/</sup> such conversations are not part of the record before the Commission and hence must be disregarded by the Court. If REA intended to rely on any such conversations as justification for its illegal activities, it was incumbent upon it to seek to make them part of the record subject to objections and cross-examination. Since REA did not do so, such conversations must be considered *dehors* the record and not available on judicial review. Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444-445 (1930); United States v. Jones, 336 U.S. 641, 673 (1949).

In any event such evidence, even if of record, would not serve to excuse or justify REA's behavior since it is well-settled that the Commission is not bound by the pronouncements of its employees. Minneapolis & St. Louis R.R. Co. v. Peoria & Pekin Union Railway Co., 270 U.S. 580 (1926); Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146 (1946); and U.S.A.C. Transport, Inc. v. United States, 235 F.Supp. 689 (D. Del. 1964), aff'd per curiam, 380 U.S. 450 (1965).

Moreover, even if this Court were to consider the Commission's "Statement for the Interstate Commerce Commission Concerning Order, Dated December 8, 1975, Authorizing Trustee to Continue to Operate Rexco" that was filed with the Bankruptcy

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33/ Although REA now suggests for the first time that meetings between the Commission and the Trustee should be considered the "decisive factor," there is no evidence of record establishing that such meetings occurred. If such meetings had occurred dealing with the legality of Rexco's operations, they would have been prohibited *ex parte* communications under the Commission's Canons of Ethics because the Rexco operations were the subject of a pending Complaint proceeding. Respondents' position should in no way be considered as questioning the ethical propriety of such private communications where the problems concerning the disposition of the bankrupt estate were discussed.



Court, it will discover that the Commission did not simply indicate the pendency of the Complaint<sup>34/</sup> proceedings as REA (Br., pp. 53-54) falsely implies. Rather, the statement continues:

Second, the Trustee's application to the court requesting entry of the order of December 8, 1975, in paragraph 9 on page 3, inappropriately may have given the impression that the Commission has informally approved the continuation of Rexco's operation, . . . .

Finally, the Commission's counsel carefully advised the Bankruptcy Court as follows:

[S]ince the Commission will be required to rule on the lawfulness of Rexco's operation in the litigation now pending before it, neither the agency nor its representatives are in a position to discuss or express an opinion on that subject matter.

As the above demonstrates, the Commission went to great lengths to avoid conveying any impression that the Commission would act favorably or that it condoned the Rexco operations. This, of course, was in keeping with the proper role of an adjudicatory body. Contrary to REA's assertion (Br., p. 52), the Commission, with the Complaint case pending before it, not only had no duty to advise the Bankruptcy Court that the Rexco operation was patently unlawful, but had the Commission so advised the Bankruptcy Court, it would have been prejudging the Complaint<sup>35/</sup> case.

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<sup>34/</sup> Petitioner's assertion that this paragraph is the "relevant portion" of the Commission's statement is misleading.

<sup>35/</sup> It should be noted that Section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c), prohibits the Commission from entering a cease and desist order in a Complaint proceeding before notice and hearing. Thus, any suggestion that the Commission should have informed REA of the illegal nature of its operations is contrary to the Act.



C. REA's reliance on the Commission's decision not to suspend the Rexco tariff is likewise misplaced.

Petitioner cannot successfully contend that the Commission's decision not to suspend the Rexco tariff was an indication that the Commission had approved the Rexco operation. The issue before the Commission at the suspension stage is whether the new rate or charge is compensatory and not whether a carrier's operations are illegal. As the Commission (Division 2) recognized in its Order served May 28, 1976, in Docket No. 36285, "Petition to Strike Tariff of Rexco Division, REA Express, Inc.," the issue of whether the Rexco operations were within the proper scope of the REA certificates and temporary authorities was not considered by the Division since it was before the Commission in the pending Complaint proceedings, and since resolution of that issue was not <sup>36/</sup> appropriate for summary disposition. As Division 2 carefully noted:

It further appearing, That petitioner challenges the lawfulness of the tariff on grounds that it is inconsistent with REA's operating authority; that determination of this question would require interpretation of the scope of REA's service provided thereunder in the light of the changed circumstances concerning REA's overall operations; that similar issues are pending before the Commission in complaint proceedings Nos. MC-C-8862, MC-C-8864, MC-C-8867, and MC-C-8874; and that, under these circumstances, the issues raised by the petition are not appropriate for summary disposition.

In other words, the Division considered it to be inappropriate to consider the issue of the lawfulness of the operations

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<sup>36/</sup> In the tariff proceeding no oral hearing was held. Thus, a decision was rendered solely on written submissions without an opportunity for cross-examination.



within the narrow confines of the proceeding involving the economic, <sup>37/</sup> not operational, reasonableness of the Rexco operations. The Trustee's belated attempt to draw an inference of approval from the Commission's decision not to suspend the Rexco tariff is meritless.

It should be remembered, as stated by the Commission in Schreiber-Investigation of Operations & Revocation of Certificates, 125 M.C.C. 552, 567 (1976), that "[i]t is, however, a fundamental principle of carrier regulation that transportation firms must be self-policing with respect to their continuing compliance with the Act and regulations. Pre-Fab Transit Co., Ext.-International Falls, 112 M.C.C. 664, 676 (1970)." REA's attempt to shift the blame to the Commission in order to avoid the Commission's finding that its operations were in the nature of willful violations must be rejected. Likewise, its invocation of equitable principles as applying to this proceeding should be summarily

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<sup>37/</sup> REA's assertion (REA Br. 55) that the Trustee's belief regarding the lawfulness of Rexco's operations was reinforced by the affidavit of the Rexco General Manager submitted in the tariff proceeding (C.I. 56, Ex. 1, App. 2; J. A., pp. 251-256) is less than convincing. First, there can be no assumption that the affidavit was even considered by the Commission in reaching its conclusion that the proposed rates were reasonable. Second, the affidavit falls far short of a "full" explanation since it fails to advise the Commission that Rexco will not observe REA's authorized regular routes, that it will not comply with its governing tariff publications, that required inspections of vehicles will not be made, or that Rexco will not exercise responsibility for the control of drivers or shipments after pickup. The affidavit is, therefore, more important for what it did not say, rather than what it did. The fact that the Rexco operations "substantially conformed to the description in the Affidavit . . ." (REA Br. at 55) cannot remotely support REA's hopeful inference that such operations were presumed to be legal. The affidavit could not give license to REA to blatantly disregard the Commission's lawful requirements.



rejected. REA's violent departure from lawful Commission requirements precludes it from coming before this Court with "clean hands." Compare, Kama Rippa-Mustic, Inc. v. Schekeryk, 510 F.2d 837, 844 (2d Cir. 1975).

D. The Commission's decision to find willfulness in the absence of prior admonitions is lawful.

The remaining contentions advanced by Petitioners with respect to the willfulness issue are equally specious. In the first place, Petitioners cannot point to any statutory requirement that prohibits the Commission from entering a finding of willfulness in the absence of a prior Commission admonition or the entry of a cease and desist order.

Second, the implication (REA Br., 43-49) that the Commission invoked the sanctions imposed by Section 212(a) of the Interstate Commerce Act, 49 U.S.C. §312(a), is based on an erroneous interpretation of the Commission's Order since Section 212(a) applies only to the revocation of permanent certificates. As the Commission's Order served November 19, 1976, specifically states, the Commission's revocation of the hub temporary authority was predicated on Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. §310a(a), and 49 C.F.R. §1101.4, which reads as follows:

Nothing in this part shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under section 558 of the Administrative Procedure Act (5 U.S.C. 558).



Hence, cases involving Section 212(a) considerations, such as those relied upon by REA to show an alleged departure from prior Commission practice, are simply inapposite.

- E. The sanction imposed by the Commission is warranted by the record and is proper as a matter of law.

REA's final attack on the willfulness finding concerns the Commission's choice of remedy--the revocation of the hub temporary authority--which the Petitioner (Br. 72-77) claims is unwarranted, without justification, and arbitrary and capricious. In raising this contention, REA attempts to argue the severity of the sanction by comparing it with more lenient sanctions imposed by the Commission in other cases and by claiming that the Commission disregarded the interest of the shipping public in the preservation of nationwide express service. These arguments should be rejected.

As the Supreme Court ruled in Butz v. Glover Livestock Company, Inc., 411 U.S. 182, 187 (1973):

The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. FCC v. WOKO, 329 U.S. 223, 227-228, 67 S.Ct. 213, 215-216, 91 L.Ed. 204 (1946); FTC v. Universal-Rundle Corp., 387 U.S., at 250, 251, 87 S.Ct., at 1626-1627; G. H. Miller & Co. v. United States, supra, 260 F.2d, at 296; Hiller v. SEC, 429 F.2d 856, 858-859 (CA2, 1970); Dlugash v. SEC, 373 F.2d 107, 110 (CA2, 1967); Kent v. Hardin, 425 F.2d 1346, 1349 (CA5, 1970).



Stated in slightly different terms, the Second Circuit has ruled, in addition to the two cases of this Circuit cited by the Supreme Court in Butz, that:

The Commission must have a very large measure of discretion in determining what sanctions to impose at a particular time in particular cases. Failing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission.<sup>38/</sup>

Petitioners herein cannot demonstrate such a gross abuse of discretion. Initially, it is uncontested that the revocation of the hub authority will not have the slightest effect on REA's ability to serve the public since REA lacks any operational capability. Thus, the only reason to perpetuate the hub temporary authority would be to enable Alltrans to renew operations thereunder.<sup>39/</sup> However, such a step incorrectly assumes that the hub concept represents the only viable means by which express service could be rendered, which assumption was carefully rejected by the Commission in its Order of November 19, 1976, when it pointed to the availability of other statutory remedies if a need exists for express service.<sup>40/</sup> Also, the Commission in its

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<sup>38/</sup> Tager v. Securities and Exchange Commission, supra, 344 F.2d at 9.

<sup>39/</sup> This reason may now be possibly moot, as the Commission, by Order dated January 27, 1977, denied the Alltrans' application to operate the REA authorities under §210(a)(b) of the Interstate Commerce Act (49 U.S.C. 310(a)(b)).

<sup>40/</sup> C.I. No. 125, pp. 21-22, J.A., pp. 729-730.



Order served January 28, 1977, further explained its decision to dismiss the hub permanent authority rather than permit Alltrans to be substituted as applicant. As the Commission reasoned: <sup>41/</sup>

Alltrans' proposal in this regard was properly rejected in that to have followed its suggestion would have allowed the defendant to "transfer away" redress for its breaches of the Act and this Commission's rules and regulations alleged herein; that moreover, it should be pointed out that Alltrans can receive no greater interest in the involved Hub application and temporary authority than that of REA, together with any infirmities, both inherent or acquired, in connection with said application and authority; that in a very real sense the instant proceeding involved a determination of those interests and infirmities; and that in these circumstances, the disposition herein properly preceded disposition of the applications of Alltrans noted above; . . . .

Finally, for the Commission to perpetuate the hub authority application would require it to ignore REA's previous representations to the Commission that "[c]ostly, inefficient operations under the Hub authority and the resulting inadequate service and declining volume have placed express service, and REA, in a true emergency situation."<sup>42/</sup> The Commission would also have to disregard REA's representations that "there is no way that REA's present authority [the hub authority] can be used to provide the flexible, efficient, economical service required

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<sup>41/</sup> C.I. No. 242, p. 3, J.A., p. 840.

<sup>42/</sup> Exhibit 3, p. 12, J.A., p. 396.



for express operations in today's world."<sup>43/</sup> It would also have to disregard REA's previous testimony that the inadequacies and lack of flexibility of the hub authority "have penalized the shipping and receiving public as well as REA."<sup>44/</sup> Most importantly, the Commission, by perpetuating the hub temporary authority so as to permit Alltrans to substitute itself for REA, would have to disregard the ultimate fact that the hub system was a failure and that the continuing operating difficulties experienced by REA with the hub system contributed to the decline in REA's surface express traffic and its termination in November 1975.

In the absence of any evidence to overcome or rebut REA's own experience and representations, the Commission had no recourse but to conclude that the hub system--despite the applicant--is not a feasible operational concept. Any other conclusion would have to be considered as arbitrary and capricious, and without a rational basis.

In short, the Commission's decision is based on substantial evidence of record and clearly discloses a rational

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<sup>43/</sup> Id., p. 4, J.A., p. 388.

<sup>44/</sup> Id.



connection between the facts found and its choice of remedy. This, the Supreme Court has repeatedly recognized, is all that is required. As the Court recently observed in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-286 (1974):

Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, *supra*, 401 U.S. at 416, 91 S.Ct. at 824. The agency must articulate a "rational connection between the facts found and the choice made." Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed. 2d 207. While we may not supply a reasoned basis for the agency's action that the agency itself has not given, SEC v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 595, 65 S.Ct. 829, 836, 89 L.Ed. 1206.



## IV.

TEMPORARY AUTHORITY IS NOT PROTECTED  
BY THE SECOND SENTENCE OF SECTION 558

In light of the Commission's properly exercised discretion to dismiss the hub application, and the clearly willful nature of the violations found in this proceeding, Respondents do not believe the Court will have to reach the Commission's alternative finding that the revocation provisions of Section 558(c) do not apply to temporary authorities. It is, however, Intervening Respondents' position that the hub temporary authority operations are without the protection of Section 558(c) of the Administrative Procedure Act for two reasons. First, "temporary authority" is not entitled to the protection afforded by the notice and compliance provisions of Section 558. Second, since there have been no continuing operations under the hub temporary authority since November 1975, the considerations underlying the protection of temporary operations are not involved.

In the first place, the legislative history of Section 558(c) makes it clear that Congress did not intend to apply the notice and compliance provisions to temporary authority. Thus, for example, the Senate Document containing the legislative history of the Administrative Procedure Act,<sup>45/</sup> reads as follows:

. . . The same is true of "public health, interest or safety." The standard of "public . . . interest" means a situation requiring immediate action irrespective of the equities or injuries to the licensee, but the term does

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<sup>45/</sup> S. Doc. No. 248, 79th Cong., Administrative Procedure Act, Legislative History, 2d Sess. 211-212 (1945).



not confer upon agencies an arbitrary discretion to ignore the requirement of notice and an opportunity to demonstrate compliance. However, this limitation does not apply to temporary permits or temporary licenses.

This theme is thereafter repeated: <sup>46/</sup>

The exceptions to the second sentence, regarding revocations, apply only where the demonstrable facts fully and fairly warrant their application. Willfulness must be manifest. The same is true of "public health, interest, or safety." The standard of "public \* \* \* interest" means a situation where clear and immediate necessity for the due execution of the laws overrides the equities or the injury to the licensee; the term does not confer upon agencies authority at will to ignore the requirements of notice and an opportunity to demonstrate compliance. However, this limitation does not apply to temporary permits or temporary licenses. <sup>47/</sup>

In addition, the Attorney General's Manual on the Administrative Procedure Act, p. 91, reads as follows:

It is clear that the provisions of this second sentence do not apply to temporary permits or temporary licenses. Sen. Rep., p. 26, H.R., p. 41 (Sen. Doc., pp. 212, 275). Such permits or licenses may be revoked without "another change" and regardless of whether there is willfulness or whether the public health, interest or safety is involved.

Furthermore, Respondents' construction of the second sentence of Section 558(c) is in accord with the decision of the United States Court of Appeals for the District of Columbia in Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 294 F.2d 217

<sup>46/</sup> Id., p. 275

<sup>47/</sup> H.R. Rep. 1980, 79th Cong., Administrative Procedure Act, 2d Sess. 41 (1946), is the same as S. Doc. 248 at p. 275. Also, see S. Rep. No. 752, 79th Cong., Administrative Procedure Act, Legislative History, 1st Sess. 26 (1945).



(D.C. Cir. 1961), cert. denied, 366 U.S. 965 (1961), rehearing denied, 368 U.S. 872 (1961), where the Court, relying heavily upon the above legislative history, rejected the contention that a "temporary license" could be cancelled only after a compliance proceeding had been brought and the carrier had been given an opportunity to conform its conduct to the law. There the Court reasoned as follows, id., at 223:

Moreover the legislative history of the Administrative Procedure Act makes clear that Section 9(b) was not intended to apply to temporary licenses. Both the Senate and House Reports contain express statements to this effect. And appended to the Senate Report is a letter from the Attorney General to the Chairman of the Senate Judiciary Committee, containing the following commentary on S. 7, the bill that developed into the Administrative Procedure Act: "The second sentence of subsection (b) [of Section 9] is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses." To the same effect is the Attorney General's Manual on the Administrative Procedure Act, where it is stated (p. 91): "Such permits or licenses may be revoked without 'another chance' and regardless of whether there is willfulness or whether the public health, interest, or safety is involved." So, even if the action of the Board could be construed to be a withdrawal, suspension, revocation or annulment, within the meaning of Section 9(b), these petitioners are not aided. It is beyond question that their licenses were temporary. (Footnotes omitted.)

While it is realized that the temporary authority involved in Great Lakes had expired, as has that herein, by the final determination of the corresponding permanent application, Intervening Respondents contend that the Court of Appeal's reliance on the unequivocal language in the legislative history is correct and should be followed.



Finally, it is Intervening Respondents' position that the Supreme Court's decision in Pan-Atlantic Steamship Corp. v. Atlantic Coast Line Railroad, 353 U.S. 436 (1957), does not require this Court to reach a contrary result, should it reach this issue. In the first place, the Supreme Court was concerned only with the question of whether the third sentence of Section 558<sup>48/</sup> authorizes the Commission to extend a temporary authority granted under §311(a) of the Interstate Commerce Act for more than 180 days. The Supreme Court was not in any respect concerned with the power of the Commission to revoke a temporary authority for good cause without hearing under Section 210a of the Interstate Commerce Act, 49 U.S.C. 310a.<sup>49/</sup> Second, in ruling that the Commission could extend a temporary authority beyond 180 days, the Court placed great emphasis (id. at 439) on the protection of the holder of temporary authority "from the damage he would suffer by being compelled to discontinue a business of a continuing nature,

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48/ This sentence at the time of the Court's decision provided as follows: "[i]n any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

49/ In the Petition for Writ of Certiorari filed by Great Lakes Airlines, Inc., the argument was squarely made that the Court of Appeal's decision "is contrary to the reasoning of this Court in the case of Pan-Atlantic Steamship Corporation v. Atlantic Coast Line Railroad, 353 U.S. 476, 77 S.Ct. 999 (1957)." However, the Supreme Court refused to grant certiorari or rehearing. In order not to mislead this Court, it should be observed that the United States did not meet this argument head-on, but instead argued that, since the temporary authorities expired upon their own terms upon the completion of the Board's consideration of the corresponding permanent application, it was unnecessary to reach the issue of alleged conflict with Pan-Atlantic.



only to start it anew after the administrative hearing is concluded." Such is not the case herein. As the Trustee repeatedly concedes in his brief (pp. 2, 3, 4, 21, 38 and 84-85), the express operations under the hub temporary authority continued only from June 1968 to November 1975. Hence, at the time of the Commission's decision herein, there were no operations under the hub temporary authority of a continuing nature that would qualify for the protection afforded by even the third sentence of Section 558(c) and the Supreme Court's holding in Pan-Atlantic.<sup>50/</sup>

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<sup>50/</sup> The Court's attention is invited to the case of Cook Cleland Catalina Airways v. Civil Aeronautics Board, 195 F.2d 206, 207 (D.C. Cir. 1952), where the Court held that "no hearing was required by the Constitution, as no existing business and no existing property was involved."



## V.

THE COMMISSION'S FINDING THAT PETITIONERS  
HAD BEEN AFFORDED DUE PROCESS HAS A RATIONAL  
BASIS AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE  
IN THE RECORD AS A WHOLE

- A. The Petitioner was put on notice that REA's fitness, operational and financial, and willfulness of violations were at issue in the proceeding.
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Petitioners' contention that REA was denied due process in that it was not afforded prior notice of the issues involved is without merit. A review of the several Complaints, the "Petition Seeking Dismissal of the MC-66562 (Sub-No. 2314) Permanent Authority Application and for Cancellation of the MC-66562 (Sub-No. 2308 TA) Temporary Authority," the various pleadings and responses filed by Complainants, the "Argument and Evidence of Complainants" and the transcript of the oral hearing conclusively demonstrate that REA's contention is not well-founded.

In the first place, the Complaints specifically put in issue the basic illegality of the Rexco operations, including the failure to satisfy the basic indicia of "express service." Thereafter, these specifics were supplemented by pleadings which called attention to REA's service at unauthorized points, to violations of the safety regulations of the Department of Transportation, and to service over unauthorized routes.

Secondly, the "Petition Seeking Dismissal," filed December 1, 1975, squarely raised the issues of whether the outstanding permanent authority application should be dismissed for failure to prosecute, and whether REA had repudiated the hub concept



in its subsequently filed applications. The issue of whether the hub temporary authority should be cancelled was also raised therein.

The Court's attention is specifically invited to the "Argument and Evidence of Complainants" filed with the Commission <sup>51/</sup> on August 23, 1976, and served on REA on the same date. By this document, the Complainants presented the defendants with detailed arguments concerning the theories upon which they would proceed and the evidence which stood behind those theories. <sup>52/</sup>

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<sup>51/</sup> C.I. No. 56. In this "Argument and Evidence" which was marked as Exhibit 1 at the hearing, Complainants presented REA with a 74-page statement of their argument, prepared statements which comprised the bulk of the direct testimony of each of Complainants' witnesses, certain documentary evidence, including a copy of a Rexco "Contract-Lease Agreement" describing the route to be followed by the driver as "irregular," copies of Rexco tariffs, copies of past REA pleadings, charts indicating violations of the Commission's leasing regulations, and Rexco dispatch sheets. At the oral hearing the evidentiary portion of Exhibit 1 was formally introduced and, following lengthy cross-examination of the sponsoring witnesses, received into evidence. J.A., pp. 169-249.

<sup>52/</sup> It should be noted that two of the Commission's findings vis-a-vis the Rexco operation--the failure to insure the required inspection of trip-lease vehicles, and the failure to see that proper express receipts or other tariff requirements were followed--were based on matters developed at the hearing. The first, the failure to inspect, was brought out by the Judge who asked the witness (Tr., p. 238; J.A., p. 331) whether she conducted inspections. As she stated (Tr., 239; J.A., p. 332), "I signed the inspections, but I did not perform them." The second was inadvertently developed by REA when it introduced Exhibit 19, consisting of a Rexco manifest, that reflected not only a violation involving a shipment with an impermissible stop-off on a collect basis, but also a failure to issue a required express receipt, in violation of REA's governing tariff publications. The Commission's reliance on these facts to illustrate willfulness is appropriate. As the Third Circuit ruled in *Curtiss-Wright Corp., Wright Aero. Division v. N.L.R.B.*, 347 F.2d 61, 73 (3rd Cir. 1965):

. . . Absent particularity of pleadings, the conduct of a party may readily be tantamount to a submission to adjudication and, especially in an administrative proceeding, such adjudication (cont'd. on p. 54)



As was summarized at page 3 of that pleading:

In this consolidated proceeding the Commission is presented with two issues: (1) whether to issue a cease and desist order against the Rexco operations, and (2) whether to dismiss the permanent authority application filed by REA Express in 1968, and to cancel accompanying authority granted REA at that time. It is Complainants' position that the evidence herein will demonstrate that REA through its Rexco Division has engaged in a pattern of operations that leaves no doubt that it has willfully and intentionally violated the terms of its authorities and that it has deliberately ignored the rules, regulations and interpretations of the Commission and is, therefore, operationally unfit. In addition, Complainants submit that since REA has been adjudged a bankrupt and is being liquidated, it is financially unfit and, furthermore, is not in a position either to perform an express service or to prosecute its pending permanent application in Docket No. MC-66562 (Sub-No. 2345, Part 181) which should be dismissed.

As this brief recitation shows, the Complainants squarely raised the issues of whether REA was unfit, both operationally and financially, as well as the related issue of willfulness. Furthermore, the transcript reveals that Complainants pursued these issues at length in order to leave no doubt that they intended to prove that REA's operations were willful and that REA was unfit.

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52/ (cont'd.)

may be based on facts arising subsequent, as well as prior, to the filing of those pleadings. Although it may be desirable to formally conform the proof to the pleadings, in the light of the above considerations we do not feel it necessary to rule that such failure should here affect the administrative disposition of the substantive issues. We thus see no merit to the Employer's position that facts arising subsequent to the filing of the amended complaint may not here serve as a basis for the determination of an unfair labor practice.



For example, Mr. Peterman, early in the proceeding, stated (Tr., p. 342):<sup>53/</sup>

Mr. Peterman: I would make the comment that it is ATA's position that this authority has been outstanding for over eight years. It has never been prosecuted. It is complainants' position that the defendants have repudiated this thing. What we are requesting based on what we allege to be blatant illegal operations [is] that the Commission take a look at this authority and find REA unfit to hold this authority, for two reasons.

They are unfit because of the conduct of the REXCO operations.

And, two, the fact that they have not prosecuted this authority for at least eight years. (Emphasis added.)

As this shows, REA cannot claim surprise. Throughout this proceeding REA was in a position to cross-examine and to offer rebuttal evidence that would justify its Rexco operations or show that its violations were not willful. There can be no doubt that REA was apprised of the issues at stake and, in fact, litigated them throughout the proceeding. Hence, it cannot claim that it was deprived of notice and opportunity to be heard as required by the Administrative Procedure Act and the Constitution. See, e.g., ITT Continental Baking Co., Inc., v. Federal Trade Commission, 532 F.2d 207, 215-216 (2d Cir. 1976), and the many cases cited therein at page 216.

In addition, the Court's attention is invited to the reasoning of the Seventh Circuit in L. G. Balfour Company v. Federal Trade Commission, 442 F.2d 1, 19 (7th Cir. 1971) where it was observed:

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<sup>53/</sup> J.A., p. 340.



. . . There is no requirement that a complaint in an administrative proceeding enumerate precisely every event to which a hearing examiner may finally attach significance. The purpose of the administrative complaint is to give the responding party notice of the charges against him. See 1 Davis--on Administrative Law Treatise §§ 8.04-8.05 and cases cited therein. The complaint is adequate if "the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied 347 U.S. 1016, 74 S.Ct. 864, 98 L.Ed. 1138 (1954); *Swift & Co. v. United States*, 393 F.2d 247, 252 (7th Cir. 1968). As the Commission case against petitioners unfolded, there was a "reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129 (1938); *Swift & Co. v. United States*, supra, 393 F.2d at 252. In the instant case, there is no claim that the petitioners were misled by the complaint, nor is there any evidence in the record that they could have been so misled. The issue of the secret operation of BPA and Edwards Haldeman was fully and fairly litigated before the hearing examiner and argued before the Commission. We find no prejudicial error.

In effect, Petitioners are reduced to the claim that the failure of the Complaints specifically to pray for the revocation of the hub temporary authority deprived them of notice that revocation might follow, and the Commission was, therefore, prevented from exercising its power to revoke for good cause. This contention confuses the remedy with the issue and is beside the point. As Butz v. Glover Livestock Commission Company, Inc., supra, 411 U.S. at 188 makes clear, the choice of remedy is left to the Commission and cannot be dictated by the Complainants.



Therefore, the important consideration is whether Complainants sufficiently raised the issue of willfulness and unfitness. As has been shown, REA in this proceeding was well aware that it would have to contend with the willfulness issue. Furthermore, REA's experienced counsel should have been aware that a finding of willfulness could result in revocation and prepared a defense, if possible, in order to preclude such a finding. This they did not, or could not, do.

Since Petitioners were aware of Complainants' willfulness theory, the situation is readily distinguishable from those instances where liability is based on a legal theory neither alleged in the complaint, nor tried before the Administrative Law Judge. See, e.g., Bendix Corporation v. Federal Trade Commission, 450 F.2d 534, 542 (6th Cir. 1971); and Rodale Press, Inc. v. Federal Trade Commission, 407 F.2d 1252 (D.C. Cir. 1968). REA's reliance on such cases is misplaced. Since willfulness was clearly at issue from the outset, REA had ample opportunity to cross-examine and present rebuttal testimony to overcome Complainants' evidence. That is all that is required.

- B. Notice pursuant to Section 558(c) of the Administrative Procedure Act is not required in cases involving willfulness.

In any case, REA's contention must fail in light of Section 558(c) of the Administrative Procedure Act which recognizes the power of an agency to revoke a license, without notice and without another chance, if willfulness is found. As this Court ruled in Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 110 (2d Cir. 1967):



Since petitioners have been properly found guilty of willful violations, they obviously cannot claim insufficient notice to meet the requirements of § 9(b) of the Administrative Procedure Act [5 U.S.C. § 558(c)] since that statute according to its own terms does not apply "in cases of willfulness. \* \* \*"

Also, see KWK Radio, Inc. v. Federal Communications Commission, 337 F.2d 540, 541 (D.C. Cir. 1964), cert. denied, 380 U.S. 910 (1965); Goodman v. Benson, supra, 286 F.2d at 900. In other words, the Commission could have reviewed the evidence and, based on REA's flagrant conduct, found willfulness and revoked the temporary authority, even if the Complainants had not given REA adequate notice pursuant to Section 558(c) of the Administrative Procedure Act.

- C. The Commission's decision is not based on consideration of issues of public convenience and necessity for which notice was not given.

REA, in its "notice" argument (Br., pp. 79 and 96) attempts to confuse the issue further by insinuating that issues of public convenience and necessity were injected and relied upon by the Commission in reaching its decision. This claim is predicated on an erroneous interpretation of the Commission's Order of November 19, 1976. While the Commission did state<sup>54/</sup> that attempted prosecution of the permanent application would not appear to be "required by the public convenience and necessity," that statement must be reviewed in the context of both the Report and Order, which clearly reveals the basis of the dismissal to be

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<sup>54/</sup> C.I. No. 125, p. 22, J.A., p. 730.



REA's failure to prosecute and the Commission's further Order, served January 28, 1976. In the Order denying reconsideration, the Commission rejected the argument that its dismissal was based on issues of public convenience and necessity, and pointed out in no uncertain terms that its dismissal was predicated on REA's repudiation and resulting failure to prosecute. As the Commission stated: <sup>55/</sup>

that the above-referred to statements of repudiation are relevant herein on the issue of defendant's breach of Rule 247(f) of the Commission's Special Rules of Practice /<sup>49</sup> CFR 1100.247(f) which states, in pertinent part, that "/an applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof"; that said statements of repudiation are probative of REA's intent in this regard; that even though the Hub application was on file with the Commission for 8 years, the Commission did not thereby abdicate its duty to enforce Rule 247(f); and that the failure to dismiss the Hub application at an earlier date was based on this Commission's desire to allow REA every reasonable opportunity to develop a practical all-motor operation in light of REA's historically unique rail-related service; and that REA's attempt and failure to do so and its eventual bankruptcy cannot justify its breach of Rule 247(f) and thereby reverse the consequent dismissal of the Hub authority.

- D. The Administrative Law Judge ruled that the issue of REA's fitness was at issue.

Intervening Respondents take issue with the contention (REA Br., p. 96) that the Administrative Law Judge specifically ruled that the consolidated proceeding did not involve issues such as "applicant's general ability and fitness." In commenting on

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<sup>55/</sup> C.I. No. 242, p. 4, J.A., p. 841.



this issue, the Judge made the following observation (Tr., p. 346): <sup>56/</sup>

I would say that certainly insofar as the 2314 or 2345 proceeding, the issue on the merits of PC&N or fitness, are not involved. The issues must be limited strictly to those that are raised in the petition. I will review that at a later time and withhold any ruling or comment until I have done that.

Thereafter, the Judge entered his ruling (Tr., pp. 778-779), <sup>57/</sup> holding that "fitness" was at issue. In so doing, he ruled as follows:

Judge Beddow: On the record.

I had indicated earlier that I would defer my comment, or ruling on the issues relating to the temporary authority matter. Inasmuch as this motion has come up, I guess this would be an appropriate time to respond.

As far as the Commission is concerned, fitness is always an issue that the Commission itself may recognize.

As far as the matter of whether there is an immediate and urgent present public need for express service, under the so-called HUB system, I will not consider that to be an issue in this embraced proceeding.

The operational ability of Railway Express, or REA, presently to meet an immediate and urgent need for an express service under the so-called HUB system, cannot be divorced as an issue here, but I believe that it is an issue that is not contested. The replies to the complaint for one thing admit the status of REA as bankrupt, and non-operating company, at least as far as the provision of express service of the type that was described in the temporary authority application.

So this has to remain as an issue. (Emphasis added.)

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<sup>56/</sup> J.A., p. 344.

<sup>57/</sup> J.A., pp. 361-362.



The above language reveals the questionable candor in REA's characterization of the Judge's rulings. More importantly, however, it shows that REA was made aware, not only by the Complainants' pleadings, but also by the Judge's explicit ruling with respect to a written motion tendered by REA, that the matter of REA's fitness was squarely in issue. REA's failure to address itself to the fitness issue was thus not due to absence of proper notice as REA insinuates (Br., p. 80), but rather to the lack of any evidence to repudiate or rebut the lack-of-fitness evidence presented by Complainants.



## VI.

THE COMMISSION'S DECISION IS  
CONSISTENT WITH THE PUBLIC  
INTEREST AND THE NATIONAL  
TRANSPORTATION POLICY

The final contention to be considered is the claim raised by BRAC (Br., p. 17) that the Commission, either sua sponte or after BRAC's request, was required to consider employee interests under the National Transportation Policy and that its alleged failure to do so renders the Commission's decision arbitrary and capricious, and an abuse of discretion.<sup>1/</sup> This contention must be rejected on both legal and factual grounds.

In the first place, it should be noted that while the Commission had an obligation to consider the National Transportation Policy in this proceeding, which it did,<sup>2/</sup> there is absolutely nothing in either the Interstate Commerce Act or the National Transportation Policy to suggest that the Commission must discuss the interests of employees before revoking eight-year-old temporary authority under which no operations have been conducted for well

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<sup>1/</sup> While REA in passing mentions the National Transportation Policy, one must question REA's interest in protecting the American public's opportunity to utilize express-type service. As is obvious from the history of this proceeding, REA's interest in protecting the shipping public's interest was not sufficient to keep it from voluntarily ceasing its traditional express operations in November 1975. Respondents suggest that REA's recently discovered interest in "express service" has nothing to do with the public interest, but is rather predicated on its desire to capitalize on its unprosecuted application as a salable commodity.

<sup>2/</sup> See C.I. No. 125, pp. 20, 21 and 23, J.A., pp. 728, 729 and 731.



over a year. This is particularly true in light of the explicit wording in the Policy which directs the Commission, as part of its obligations thereunder, ". . . to encourage fair wages and equitable working conditions . . . ." However, where as here the employees have been released and the operations have ceased, such considerations never arise. Even assuming, arguendo, that the Policy does impose some obligation upon the Commission to make such findings the Commission, at least sua sponte, would have found it impossible to "encourage fair wages and equitable working conditions" pursuant to such Policy, since all BRAC employees had been terminated prior to the commencement of this action, and the Trustee, on REA's behalf, was no longer obligated to recognize BRAC's collective bargaining agreement. See, BRAC v. REA Express, 523 F.2d 164 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975).

We do not desire to sound unsympathetic to former employees, but we would suggest that BRAC's representations before this Court may be properly characterized as relating more to their members' status as priority creditors rather than their status as potential employees of a reorganized REA. The subsequent hardship which will befall creditors is not the fault of the Interstate Commerce Commission, but those responsible at REA who allowed this unfortunate situation to come about.

Second, BRAC has not pointed to any evidence that, in the context of this proceeding, would bring the asserted employee interest within the ambit of the National Transportation Policy.



In this respect, it should be observed that BRAC failed to assert any such interest before the Commission until long after the hearing had been concluded, and a decision had been rendered.<sup>3/</sup>

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3/ In denying BRAC's motion to intervene as untimely, the Commission ruled, C.I. 242, pp. 2-3, J. A., pp. 839-840;

It appearing . . . that by its own admission appearing at page 2 of its motion for leave to file petition to intervene in (1) (a) above BRAC "was aware of these proceedings shortly before the hearing" and chose not to intervene because it concluded that it could not aid in the development of the record herein in that it was not knowledgeable as to the REA operations being challenged; that nevertheless its decision not to intervene was also made with the knowledge that the survival of the operating rights of REA's estate was in issue in the complaint proceeding and therefore it was aware that the interests of the workers it represents could be affected therein; that Section 17(11) by its terms, places the decision to intervene herein with BRAC as the duly authorized representative of REA's former employees; that along with the right of intervention conferred upon such a duly authorized representative by Section 17(11), there is an attendant duty to exercise that right responsibly; that with the actual knowledge possessed by BRAC before hearing in this matter, BRAC made an informed election not to intervene and knowingly relinquished any right of intervention herein under Section 17(11); that as the duly authorized representative of former REA employees, BRAC could and did relinquish their rights herein under Section 17(11); that therefore BRAC's petition for intervention is properly considered, along with that of Manning et al., in (5) (a) above, under the intervention rules of the Commission's General Rules of Practice;

It further appearing, That a review of their pleadings reveals that both BRAC and Manning et al., possessed actual and/or constructive knowledge of this proceeding such that, with reasonable diligence, they could have seasonably intervened herein; that in failing to do so they are not entitled to intervention at this time under Rule 72(b) of this Commission's General Rules of Practice; . . . .



Furthermore, the Commission upon reviewing the BRAC arguments concerning the asserted interests found "that even if the arguments in their tendered petitions were considered, they would not warrant a result different from that found by this Commission in its decision herein of November 17, 1976." This finding, of course, shows that the Commission did not ignore the arguments raised by BRAC, but reviewed them in sufficient enough detail to conclude that they were not persuasive.

In any case, it should be noted that the Commission is not under an obligation to make specific findings concerning the National Transportation Policy, particularly where such issues are not timely raised. As Judge Augustus N. Hand, writing for the three-judge District Court in Luckenbach S.S. Co. v. United States, 122 F.Supp. 824, 827-828 (S.D.N.Y. 1954), aff'd per curiam, 347 U.S. 984 (1954), observed with respect to the Commission's obligations under the National Transportation Policy:

It is clear that this expressed policy must serve as a guide to the Commission in all its decisions . . . . However, it seems equally clear that the Commission can not and should not be required to discuss each consideration expressed in the National Transportation Policy in every decision it renders. (Emphasis added).

Accord, Roadway Express, Inc. v. United States, 213 F.Supp. 868 (D. Del. 1963), aff'd per curiam, 375 U.S. 12 (1963); and Seatrains Lines, Inc. v. United States, 152 F.Supp. 619 (D. Del. 1957), aff'd per curiam, 355 U.S. 181 (1957).

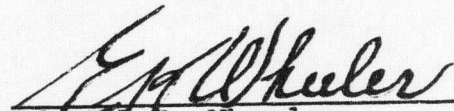



CONCLUSION

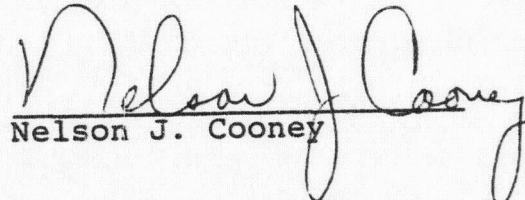
For all the above-stated reasons, the Commission's decision should be affirmed.

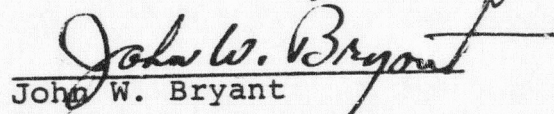
Respectfully submitted,

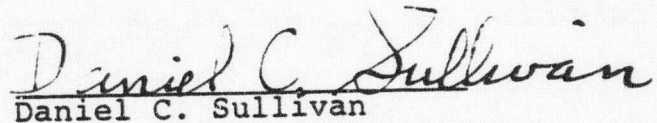
  
Richard H. Streeter

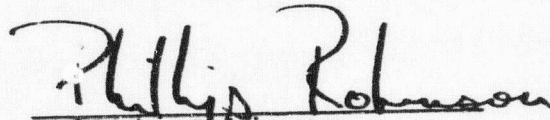
  
Edward K. Wheeler

  
Todd A. Peterman

  
Nelson J. Cooney

  
John W. Bryant

  
Daniel C. Sullivan

  
Phillip Robinson

DATED: March 18, 1977



## APPENDIX A

Brada Miller Freight System, Inc.  
George Transfer & Rigging Co.  
Schneider Transport, Inc.  
Associated Truck Lines, Inc.  
B&D Motor Express, Inc.  
Eastern Express, Inc.  
Great Lakes Express Company  
Holland Motor Express, Inc.  
Interstate Motor Freight System  
Alleghany Corporation, D/B/A Jones Motor  
Jones Transfer Company  
Long Transportation Company  
Ryder Truck Lines, Inc.  
Earl C. Smith, Inc.  
Strickland Transportation Co.  
U. S. Truck Company, Inc.  
United Trucking Service, Inc.  
Central Freight Lines Inc.  
Red Arrow Freight Lines, Inc.  
Brown Express, Inc.  
Texas Oklahoma Express, Inc.  
Saia Motor Freight Line  
Alamo Express, Inc.  
Southwestern Motor Transport  
American Trucking Associations, Inc.  
McLean Trucking Company